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SERVICE DATE - OCTOBER 28, 1999

SURFACE TRANSPORTATION BOARD[1]

DECISION

No. 41476

NDI TRANSPORTATION SERVICES, INC.--PETITION FOR DECLARATORY ORDER--CERTAIN RATES AND PRACTICES OF GROSS COMMON CARRIER, INC.

Decided: October 26, 1999

We find that the collection of undercharges sought in this proceeding would be an unreasonable practice under 49 U.S.C. 10701(a) and section 2(e) of the Negotiated Rates Act of 1993, Pub. L. No. 103-180, 107 Stat. 2044 (NRA) (now codified at 49 U.S.C. 13711). Because of our findings under section 2(e) of the NRA, we will not reach the other issues raised in this proceeding.

BACKGROUND

This matter arises out of a court action in the United States District Court for the Western District of Wisconsin, in Gross Common Carrier, Inc. v. Rainbow Systems, Inc., d/b/a NDI Transportation, No 94-C-2172-S. The court proceeding was instituted by Gross Common Carrier, Inc. (Gross or respondent), a former motor common and contract carrier, to collect undercharges from Rainbow Systems, Inc., d/b/a NDI Transportation Services, Inc. (NDI or petitioner), a licensed property broker. Gross seeks undercharges of $20,982.36 allegedly due, in addition to the amounts previously paid, for services rendered in transporting 31 shipments of miscellaneous commodities between January 25, 1989, and February 8, 1991. By order entered September 8, 1994, the court dismissed the proceeding without prejudice to allow petitioner to seek determination by the ICC of those issues properly within the agency's jurisdiction.

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[1] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the ICC Termination Act or the Act), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the Act provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the Act. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 13709-13711. While this decision generally applies the law in effect prior to the Act, new 49 U.S.C. 13711(g) provides that new section 13711 applies to cases pending as of January 1, 1996, and hence section 13711 will be applied to the factual situation presented in this proceeding. Unless otherwise indicated, citations are to the former sections of the statute.

Pursuant to the court's order, NDI, on October 7, 1994, filed a petition for declaratory order requesting the ICC to resolve issues of contract carriage, exempt intermodal motor-rail transportation subject to 49 CFR part 1090, unreasonable practice, rate reasonableness. and tariff applicability. By decision served October 19, 1994, the ICC established a procedural schedule for the submission of evidence on non-rate reasonableness issues. On February 15, 1995, petitioner filed its opening statement. Respondent filed its reply statement on March 23, 1995, and NDI submitted its rebuttal on April 14, 1995.

NDI asserts that the subject shipments moved in contract carriage pursuant to an agreement between Gross and Union Pacific Freight Services Company (UPFS), an ICC authorized broker and affiliate of the Union Pacific Railroad Company. NDI claims that the contract was executed in contemplation of and for the benefit of customers of UPFS, which included NDI and its shipper/clients. Petitioner further contends that the shipments at issue were transported in intermodal motor-rail service, a service that in conformity with 49 CFR 1190 is exempt from regulation; that the effort by Gross to collect additional charges constitutes an unreasonable practice under section 2(e) of the NRA; and that the rates respondent here seeks to assess are unreasonable.

NDI supports its arguments with an affidavit from James R. Difanis, petitioner's Vice President.[2] Mr. Difanis states that NDI, as a licensed property broker, arranges transportation services for both shipper and carrier clients. He asserts that petitioner had a transportation arrangement with UPFS under which NDI would request UPFS to arrange for intermodal motor-rail carrier less than truckload (LTL) movements for NDI's shipper/customers. UPFS would arrange pickup/consolidation and breakbulk/distribution services for prior or subsequent trailer-on-flatcar (TOFC) or container-on-flatcar (TOFC) movement by rail or substituted motor carrier service for petitioner's shipper customers. Mr. Difanis maintains that petitioner was a customer of UPFS, not Gross; that the subject shipments were transported pursuant to a March 4, 1987 contract between UPFS and Gross under agreed upon terms and conditions that included freight charges set forth in the contract;[3] and that the transportation services provided by Gross were subject to the terms of its agreement with UPFS.

Mr. Difanis further states that Gross billed NDI for the intermodal transportation services provided to petitioner's shipper customers at the rates negotiated and agreed to in the UPFS/Gross

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[2] Mr. Difanis' affidavit was originally submitted in the underlying bankruptcy court proceeding.

[3] Attached as Exhibit A to Mr. Difanis' affidavit is a copy of a document entitled "Contract For Motor Carrier LTL Services" executed by UPFS and Gross on March 4, 1987, as well as amendments thereto. These documents indicate that Gross is to solicit shipments and quote rates for through movements pursuant to rates set forth in an attached appendix to the agreement (Section 3.1); and that Gross is to bill and collect applicable freight charges for the complete through movement from shippers, deduct its compensation, and forward the balance to UPFS (Section 5 as amended).

contract and that the assessed freight charges were paid by NDI. He also states that the rates charged were comparable to those charged for similar transportation services available to NDI from other carriers and asserts that NDI would not have used the intermodal services of UPFS or Gross had Gross offered to provide the services at the rates here being sought.

Included with petitioner's opening statement is an affidavit of counsel to which is attached a listing of the shipments at issue by freight bill number, shipment date, and claimed balance due (Exhibit 3). Also attached are copies of the 31 corrected freight bills issued on behalf of respondent that reflect originally issued freight bill data as well as the "corrected" balance due amounts (Exhibits 3-A to 3-EE). An examination of these attached exhibits indicates that the charges originally assessed by Gross were substantially less than the amounts here being sought by respondent.[4]

Gross states that it entered into arrangements for through transportation service to and from areas served by other regional carriers, with transportation services between the hubs of the regional carriers being the responsibility of UPFS. Respondent maintains that petitioner was not involved with the Gross-UPFS service contract; that the mere existence of a freight handling arrangement involving Gross, UPFS, and other regional carriers does not establish the existence of a contract carrier service; and that the fact that the subject shipments were transported in interline service with other motor carriers precludes a finding of contract carriage. Gross asserts that it solicited the subject shipments and was responsible for the entire carrier relationship with its customers. It argues that nothing in its agreement with UPFS suggests that the agreement was intended to benefit third parties such as NDI. Finally, Gross asserts that the movements in question do not satisfy the criteria for exempt TOFC/COFC intermodal service described in 49 CFR 1090.

Gross supports its position with affidavits from Roger Placzek, respondent's Vice President-Sales and Marketing, and Oscar P. Peck, founder of Truck Rates Co., Inc.[5] Mr. Placzek described respondent's motor carrier operations and its relationship with UPFS. He states that all billings for prepaid shipments originated by Gross that moved through the UPFS system were issued by Gross in its own name, that Gross was responsible for collection of these billings, that Gross personnel were responsible for all contacts with customers concerning those shipments, and that UPFS had no contact with the customers.

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[4] The corrected freight bills indicate that discounts of 45% to 55% were applied to originally assessed charges for 15 of the subject shipments and that the originally assessed charges for 13 of the subject shipments were based on flat rates. The documents relating to the remaining 3 shipments indicate that discounts were applied to the originally assessed charges but were not sufficiently legible to allow for a determination of the discount percentage applied.

[5] Truck Rates is a Texas corporation specializing in the audit of motor carrier freight bills and the collection of undercharge claims.

Mr. Peck was engaged by Mark/AGL, Inc., the court-appointed auditor in defendant's bankruptcy proceeding, to audit defendant's freight records. Mr. Peck states that he specifically reviewed the freight bills for the subject shipments to determine whether the shipments moved in joint-line service. He asserts that all of the subject shipments involve interline movements, that such movements could not be considered to be contract carrier service, and that the rates contained in the initial billings were not applicable. Accordingly, freight correction notices were issued in which the original charges assessed by Gross were re-rated based on applicable bureau tariffs in which both respondent and its joint line carriers were participants. Mr. Peck states that his review of respondent's files failed to reveal the existence of any contract between NDI and Gross.

DISCUSSION AND CONCLUSIONS

We dispose of this proceeding under section 2(e) of the NRA. Accordingly, we do not reach the other issues raised.

Section 2(e)(1) of the NRA provides, in pertinent part, that "it shall be an unreasonable practice for a motor carrier of property . . . providing transportation subject to the jurisdiction of the [Board] . . . to attempt to charge or to charge for a transportation service . . . the difference between the applicable rate that [was] lawfully in effect pursuant to a [filed] tariff . . . and the negotiated rate for such transportation service . . . if the carrier . . . is no longer transporting property . . . or is transporting property . . . for the purpose of avoiding application of this subsection."[6]

Federal Highway Administration records now confirm that Gross no longer transports property.[7] Accordingly, we may proceed to determine whether Gross' attempt to collect undercharges (the difference between the applicable filed tariff rate and the negotiated rate) is an unreasonable practice.

Initially, we must address the threshold issue of whether sufficient written evidence of a negotiated rate agreement exists to make a section 2(e) determination. Section 2(e)(6)(B) defines the term "negotiated rate" as one agreed upon by the shipper and carrier "through negotiations pursuant to which no tariff was lawfully and timely filed . . . and for which there is written evidence of such agreement." Thus, section 2(e) cannot be satisfied unless there is written evidence of a negotiated rate agreement.

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[6] The ICC Termination Act removed the limitation that made section 2(e) of the NRA applicable only to transportation services provided prior to September 30, 1990. Thus, the remedies in section 2(e) may be invoked for all the shipments at issue in this proceeding, including the two shipments transported after September 30, 1990.

[7] While the record in this proceeding includes assertions to the effect that Gross was continuing to function as an operating motor carrier, records of the Federal Highway Administration reveal that Gross' motor carrier operating authorities were revoked on September 19, 1996.

Here, the record contains copies of the freight bill corrections issued on behalf of respondent that indicate initially assessed charges based discounted class rates or flat rates that are significantly less than the charges respondent is here attempting to collect. In addition, the record contains a written contract executed by UPFS and Gross indicating that Gross was to solicit shipments and quote rates for through movements pursuant to rates set forth in an attachment to the contract. We find this evidence sufficient to satisfy the written evidence requirement of section 2(e). E.A. Miller, Inc.--Rates and Practices of Best, 10 I.C.C.2d 235 (1994). See William J. Hunt, Trustee for Ritter Transportation, Inc. v. Gantrade Corp., C.A. No. H-89-2379 (S.D. Tex. March 31, 1997) (finding that written evidence need not include the original freight bills or any other particular type of evidence, as long as the written evidence submitted establishes that specific amounts were paid that were less than the filed rate and that the rates were agreed upon by the parties)
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In this case, the evidence is substantial that the parties conducted business in accordance with agreed-to negotiated rates that were originally billed by Gross and paid by NDI. Gross acknowledges that it solicited traffic from NDI and that it had previously entered into a transportation agreement with UPFS. The rates originally billed by Gross and paid by NDI appear to be those established in the agreement between Gross and UPFS. The original application of these rates confirms the assertions of Mr. Difanis that petitioner was a customer of UPFS and that the subject shipments were transported pursuant to the terms and conditions set forth in the contractual agreement between UPFS and Gross. These facts reflect the existence of negotiated rates that were applicable to and correctly applied by Gross in its original freight bills issued to NDI. The evidence further indicates that NDI relied upon the agreed-to rates in tendering its traffic to Gross and that petitioner would not have used respondent to handle its traffic had respondent attempted to charge the rates it here seeks to assess.

In exercising our jurisdiction under section 2(e)(2), we are directed to consider five factors: (1) whether the shipper was offered a transportation rate by the carrier other than the rate legally on file [section 2(e)(2)(A)]; (2) whether the shipper tendered freight to the carrier in reasonable reliance upon the offered rate [section 2(e)(2)(B)]; (3) whether the carrier did not properly or timely file a tariff providing for such rate or failed to enter into an agreement for contract carriage [section 2(e)(2)(C)]; (4) whether the transportation rate was billed and collected by the carrier [section 2(e)(2)(D)]; and (5) whether the carrier or the party representing such carrier now demands additional payment of a higher rate filed in a tariff [section 2(e)(2)(E)].

Here, the evidence establishes that NDI, acting on behalf of its shipper/customers, was offered negotiated rates by Gross; that NDI, reasonably relying on the offered rates, tendered the subject traffic to Gross; that the negotiated rates were billed and collected by Gross; and that Gross now seeks to collect additional payment based on higher rates filed in a tariff. Therefore, under 49 U.S.C. 10701(a) and section 2(e) of the NRA, we find that it is an unreasonable practice for Gross to attempt to collect undercharges from NDI for transporting the shipments at issue in this proceeding.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. This proceeding is discontinued.

2. This decision is effective on its service date.

3. A copy of this decision will be mailed to:

The Honorable John C. Shabaz
United States District Court
for the Western District of Wisconsin
P.O. Box 591
Madison, WI 53701

Re: No. 94-C-2172-S

By the Board, Chairman Morgan, Vice Chairman Clyburn, and Commissioner Burkes.

Vernon A. Williams
Secretary